United Food and Commercial Workers, Local No. 1996 *and* Visiting Nurse Health System, Inc.
Case 10–CC–1335

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

This case presents the question whether a union violates Section 8(b)(4)(ii)(B) of the National Labor Relations Act by engaging in secondary boycott activities where an object of the union's actions is to enforce its National Labor Relations Board certification as the collective-bargaining representative of employees of the primary employer.[1] For the reasons that follow, we find that the Respondent Union did not violate Section 8(b)(4)(ii)(B) of the Act by threatening to picket, picketing, and leafleting the United Way of Metropolitan Atlanta, a neutral, because an object of those actions was to enforce the Union's certification by the Board as the exclusive collective-bargaining representative of a unit of the Employer VNHS's employees.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent United Food and Commercial Workers, Local No. 1996 is a labor organization within the meaning of Section 2(5) of the Act.

VNHS, formerly known as Visiting Nurses Association of Metropolitan Atlanta, Inc., a Georgia nonprofit corporation with a principal office and place of business in Atlanta, Georgia, is engaged in the business of providing nursing and related services to patients in their homes. During the 12-month period ending March 14, 1997, a representative period, VNHS received revenues in excess of $100,000 in conducting the operations described above, and received revenues in excess of $100,000 directly from Medicaid and Medicare. At all material times, VNHS has been a person and an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

United Way of Metropolitan Atlanta, a nonprofit Georgia corporation with an office and place of business in Atlanta, Georgia, is engaged in the solicitation, collection, and distribution of funds for benevolent, charitable, or patriotic purposes. During the 12-month period ending March 14, 1997, a representative period, United Way received in excess of $250,000 in revenues, received in excess of $100,000 in donations from sources outside the State of Georgia, and allocated funding in excess of $100,000 directly to agencies outside the State of Georgia.

The Coca-Cola Company, Inc., a Georgia corporation with an office and place of business in Atlanta, Georgia, is engaged in the manufacture and nonretail sale and distribution of soft drinks and related products. During the 12-month period ending March 14, 1997, a representative period, Coca-Cola sold and shipped, from its Atlanta, Georgia facility, products, goods and materials valued in excess of $50,000 directly to points outside the State of Georgia.

BellSouth Telecommunications, Inc., a Georgia corporation with an office and place of business in Atlanta, Georgia, is engaged in the furnishing of telephone and related communication services. During the 12-month period ending March 14, 1997, a representative period, BellSouth has derived gross revenue in excess of $100,000, and has performed services valued in excess of $5000 in States other than the State of Georgia.

At all material times, United Way, Coca-Cola, and BellSouth have been persons and employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

On July 18, 1994, the Board issued a Decision and Certification of Representative certifying United Food and Commercial Workers, Local 1063 (Local 1063) as the exclusive collective-bargaining representative of a

[1] Pursuant to a charge filed on March 6, 1997, against United Food and Commercial Workers Union, Local No. 1996 (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on March 14, 1997.

On March 31, 1997, the General Counsel, the Charging Party Visiting Nurse Health System, Inc. (VNHS), and the Respondent filed a motion to transfer case and continue proceeding before the National Labor Relations Board and a Stipulation of Facts entered into by the parties. The parties agreed that the Stipulation with attached exhibits including the charge, complaint and notice of hearing, and the Respondent's answer constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision; and indicated a desire to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On June 4, 1997, the Board issued an order approving the stipulation, granting the motion, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

unit of nurses employed by VNHS.[2] On May 10, 1995, the Board issued an unpublished Decision in Case 10–AC–49 amending Local 1063's certification to reflect the name of its successor organization, the Respondent.

At all times material, VNHS has refused to recognize and bargain with the Respondent as the certified representative of its employees in the unit described above. On December 8, 1995, the Board issued a Decision and Order finding that VNHS's refusal to recognize and bargain with the Respondent violated Section 8(a)(5) and (1).[3]

On or about February 12, 1997,[4] the Respondent sent a letter to the United Way advising it of VNHS's refusal to recognize or bargain with the Respondent, and that the Respondent was the certified bargaining representative of VNHS employees. The letter stated that the United Way annually provides "millions of dollars" in financial support to VNHS, and noted that the Respondent and its members were strong supporters of the United Way. In addition, the letter stated that,

> unless you can provide assurance by next Monday that no funds or other assistance will be provided by United Way to [VNHS] until [VNHS] complies with its obligations to recognize and bargain with Local 1996, Local 1996 will begin picketing your offices next Monday at 10:00 AM. The picket signs will read, "To the Public. United Way is Unfair. Its money supports [VNHS], a convicted labor law violator. Please stop your contributions until United Way stops its support of [VNHS]." The picketing will cease at such time as United Way makes the assurances requested in this letter, or [VNHS] complies with its obligations under LMRA, whichever occurs sooner.

On February 14, VNHS replied to the Respondent's letter to the United Way by stating that the United Way funds received by VNHS were used solely "to provide charitable home health care to poor patients who would otherwise have to do without that needed care." Accordingly, VNHS asserted that the Respondent's threatened action, if successful, would reduce the amount of indigent care provided by VNHS and, because there would then be a need for fewer VNHS employees to provide that care, "could result in the layoff of a number of the individuals you seek to represent." VNHS also asserted that the Respondent's planned actions would be illegal. After noting that the election took place in 1992, that it had refused to bargain with the Respondent for what it believed were "valid legal reasons," and that the matter was at that time pending before the United States Court of Appeals for the Eleventh Circuit, VNHS urged the Respondent to await the court's decision.

From March 4 to 11, between the hours of 11 a.m. and 2 p.m. local time, the Respondent engaged in picketing and handbilling on the public sidewalk at the public entrance to the United Way's Atlanta, Georgia offices. Approximately five agents of the Respondent participated in each session, two of whom would engage in picketing while between two and three other agents of the Respondent would distribute handbills. The picket signs stated:

TO THE PUBLIC.
UNITED WAY IS
UNFAIR
MONEY SUPPORTS
A CONVICTED
LABOR LAW
VIOLATOR

The handbills distributed by the Respondent's agents read as follows:

To the Public:
United Way is Unfair.
It's [sic] money supports Visiting Nurses
Health System
(A Convicted Labor Law Violator)
Please Stop Your Contributions
until United Way discontinues it's [sic]
support of VNHC.

(Emphasis in original). The handbills also included the Respondent's name, address, and telephone number.

At all times material, Coca-Cola and Bell South have made charitable contributions to United Way. The Respondent admits that it did not have a labor dispute with the United Way at any time material to this case.

On March 31, the United States Court of Appeals for the Eleventh Circuit enforced the Board's Decision and Order finding that VNHS had violated Section 8(a)(5)

[2] *Visiting Nurses Assn. of Metropolitan Atlanta,* 314 NLRB 404 (1994). The unit is:

> All regular full-time and regular part-time Staff Nurses employed by the Employer, excluding all Special Services Nurses, Nurse Practitioner of Employee Health Clinic, Community Liaison Nurse, Community Care Coordinator, Weekend Nurse, Enterostomal Therapy Nurse, AIDS Health Services Coordinator, Data Processing Liaison, Utilization Review/Education Specialist, Friendship Center Nurse, Utilization Review Nurse, Nurse Trainer, Pediatric Nurses, Infusion Team Nurses, Hospice Nurses, PRNs, and Supervisors as defined in the Act.

[3] *Visiting Nurses Assn. of Metropolitan Atlanta,* 319 NLRB 899 (1995), enfd. sub nom. *Visiting Nurse Health System, v. NLRB,* 108 F.3d 1358 (11th Cir. 1997), rehearing and suggestion for rehearing en banc denied 118 F.3d 1581 (11th Cir. 1997).

[4] Unless otherwise noted, all dates are in 1997.

and (1) of the Act by refusing to bargain with the Respondent Union.[5]

C. Analysis and Conclusions

This case requires the Board to address a question of first impression: whether Section 8(b)(4)(B) prohibits a union from engaging in picketing of one employer in order to pressure another employer to recognize and bargain with the union as the certified representative of that employer's employees. As discussed more fully below, dicta in *Teamsters Local 87* (*DiGiorgio Wine Co.*)[6] suggests that secondary picketing would be lawful under these circumstances. We consider the issue anew, however. Accordingly, we must consider the text of the Act in light of established canons of statutory construction. We also must take into account the extensive guidance provided by the Supreme Court in its decisions construing Section 8(b)(4)(B), the so-called secondary boycott provision of the Act. For the reasons stated below, we have concluded that Section 8(b)(4)(B) does not proscribe secondary activity by a union for the purpose of enforcing its certification by the Board as the exclusive collective-bargaining representative of the primary employer's employees. Our conclusion is consistent with the legislative history of Section 8(b)(4)(B), which reflects a clear intent on the part of Congress to authorize secondary activity for the purpose of certification enforcement.

1. Statutory language and background

Section 8(b)(4)(ii)(B) provides that it shall be an unfair labor practice for a labor organization:

> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—
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> . . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [of the Act]: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Section 8(b)(4)(B), as set forth above, is ultimately derived from Section 8(b)(4)(A) and (B) of the Taft-Hartley Act of 1947 (which later was amended by the Landrum-Griffin Act of 1959, discussed in turn).[7] Taft-Hartley Section 8(b)(4), in pertinent part, stated that it was an unfair labor practice for a labor organization to:

> engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; [or]
>
> (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [of the Act].[8]

Congress enacted the Taft-Hartley amendments to address certain union practices. Section 8(b)(4) was "directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'"[9] The legislative history of the Taft-Hartley amendments shows that Section 8(b)(4)(A) was intended to reach

> strikes or boycotts, or attempts to induce or encourage such action, [which] are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to . . . boycott employer A because employer A either uses or otherwise deals in the

[5] *Visiting Nurse Health System v. NLRB,* above.

[6] 87 NLRB 720, 722, 748–749 (1949), affd. on other grounds 191 F.2d 642 (D.C. Cir. 1951), cert. denied 342 U.S. 869 (1951).

[7] P.L. 80–101, 61 Stat. 136 (June 23, 1947), Sec. 101.

[8] Id.

[9] *Electrical Workers Local 761 v. NLRB,* 366 U.S. 667, 672 (1961) (quoting *Electrical Workers v. NLRB,* 181 F.2d 34, 37 (2d. Cir. 1950)).

> goods of or does business with employer B (with whom the union has a dispute).[10]

Section 8(b)(4)(B), by contrast, was

> intended to reach strikes and boycotts conducted with a purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed. Moreover, strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative.[11]

The Board first considered the interplay of Taft-Hartley Section 8(b)(4)(A) and (B) in *Teamsters Local 87 (DiGiorgio Wine Co.)*, decided in 1949.[12] In considering whether unions had engaged in unlawful secondary boycotts, the trial examiner (as administrative law judges were called at the time) stated that

> although Congress intended to protect the business of a disinterested secondary employer from a boycott, Congress did not care to protect the secondary employer's business when he dealt with a primary employer who refused to recognize or bargain with the certified representative of his employees. . . . Subsection (B) [of Section 8(b)(4)] clearly sets forth an area of immunity for boycotts for recognition and bargaining. If the labor organization seeking recognition follows the peaceful machinery of the Act and achieves a certification, and if the employer nevertheless declines to recognize or bargain with it, that labor organization and all others acting on its behalf may lawfully engage in secondary boycotts which have as their purpose to force the primary employer to bargain pursuant to the certification.[13]

Because the unions urging this exemption had not been certified by the Board, however, the Board found that this exemption was not available to them.[14] This view of the import of Section 8(b)(4)(B) was repeated by trial examiners in subsequent Board decisions, but those views were not passed on by the Board when it ultimately decided the cases.[15] Scholarly commentary at the time took the same view.[16]

As stated, Section 8(b)(4) was amended by the 1959 Landrum-Griffin Act,[17] which among other things combined Taft-Hartley Section 8(b)(4)(A) and (B) into a new Section 8(b)(4)(B), the form in which it remains today. There is no indication, however, that Congress intended to change the scope of these two provisions by combining them into a single provision. Rather, the Landrum-Griffin amendments to Section 8(b)(4) were designed to close certain loopholes in the application of Taft-Hartley Section 8(b)(4)(A), which had been exposed in Board and court decisions.[18] These included broadening the reach of Section 8(b)(4) to include those "persons" who were not statutory employers and/or employees, and to

[10] S. Rept. No. 105 on S. 1126 at 22, I Leg. History of the LMRA 428 (1948).

[11] Id. This statement was repeated in the Conference Committee Report on the legislation that was subsequently enacted as the Taft-Hartley Act. See House Conf. Rept. No. 510 on H.R. 3020 at 42, I Leg. History of the LMRA 547 (1948).

Senator Taft, the chief Senate sponsor of this legislation, stated that Sec. 8(b)(4)(B) makes it an unfair labor practice "for any union to engage in an indirect organizational strike. That is to say, the teamsters cannot go to a store and say, 'unless you sign up with the clerks' union, we are going to boycott your store,' unless the clerks' union has been certified as a bargaining agent by the National Labor Relations Board." 93 Cong. Rec. 3954 (1947), I Leg. History of the LMRA 1012 (1948).

[12] Supra, 87 NLRB 720.

[13] Id. at 748–749.

[14] Id. at 722, 729.

[15] See *Sailors Union (Moore Dry Dock),* 92 NLRB 547, 568–569 (1950):

> Section 8(b)(4)(A), if it is to be read correctly, is not to be read alone, but as specifically qualified by Section 8(b)(4)(B). Unless that is done subsection (A) would destroy subsection (B) and render it meaningless in any proceeding in which, as here, the complaint confines itself to an alleged 8(b)(4)(A) violation. It would also fly in the teeth of the clear congressional intent, reflected not only by the legislative history, but by the physical structure of Section 8(b)(4) and the relationship, physical and logical between subsections (A) and (B) thereof. Construing subsection (B) as a qualification on subsection (A) means in practical effect that where the object is recognition by another employer, the validity of boycott action is to be tested by the provisions of subsection (B) rather than (A), even where (A) alone is expressly alleged to have been violated. The difference is an important one, because under 8(b)(4)(B), unlike 8(b)(4)(A), secondary boycott activities are not illegal under all circumstances, but are expressly permitted where the labor organization on whose behalf they are conducted is a certified representative.

The Board did not pass on this discussion in the absence of exceptions and in light of its holding, on other grounds, that the disputed picketing was lawful. Id. at 552 fn. 17. Accord: *Teamsters Local 554 (McAllister Transfer, Inc.),* 110 NLRB 1769, 1782, 1805 (1954) (dicta).

[16] See Dennis*, The Boycott Under the Taft-Hartley Act,* 3 N.Y.U. Ann. Conference on Labor 367, 429 (1950) ("Section 8(b)(4)(B) would also seem to have the effect by negative implication of creating an exception to Section 8(b)(4)(A) so as to protect conduct otherwise forbidden if an objective of the pressure on the secondary employer is to force the primary employer to live up to his obligation under the Act to recognize and bargain with a certified union."); *Developments in the Law—Taft-Hartley Act,* 64 Harv. L. Rev. 781, 804 fn. 183 (1951) ("although a sympathy strike on behalf of certified union appears to come within the broad language of § 8(b)(4)(A), it should nevertheless be allowed" because §8(b)(4)(B) indicates that the Act was not intended "to forbid secondary sympathy strikes to force a primary employer to bargain with a certified union.").

[17] P.L. 86–257, 73 Stat. 542–543 (Sept. 14, 1959).

[18] *NLRB v. Servette,* 377 U.S. 46, 51–54 (1964).

encompass inducements to strike or withhold services directed at only one individual. However, "these changes did not expand the type of conduct which §8(b)(4)(A) condemned, that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer."[19] As discussed below, Congress did overturn one aspect of the Board's decision in *DiGiorgio*, supra. But there is no indication that Congress sought to overturn the interpretation of Taft-Hartley Section 8(b)(4)(B), as providing an exemption for secondary recognitional activity by a certified union, set forth in *DiGiorgio* and its progeny.

2. Applicable Supreme Court precedent

Our consideration of the issue presented in this case must, of course, be guided by the decisions of the Supreme Court addressing the scope and meaning of Section 8(b)(4). As the Court observed in *Railroad Trainmen v. Jacksonville Terminal Co.*[20]

> The 1947 Taft-Hartley amendments and the 1959 Landrum-Griffin Amendments explicitly narrowed the scope of protected employee conduct under the National Labor Relations Act; §§ 8(b)(4) and 8(e) of the Act proscribed a variety of secondary activities. But Congress enacted "no . . . sweeping prohibition" of secondary conduct. And despite their relative precision of language, the experience under these amendments demonstrates that—as at common law—bright lines cannot be drawn between "legitimate primary activity" and banned "secondary activity."[21]

In *Denver Building Trades,*[22] the Court stated that Section 8(b)(4) embodied "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Accordingly, "primary activity is protected even though it may seriously affect neutral third parties."[23]

The Court has also stressed that Section 8(b)(4) does not prohibit all forms of secondary conduct:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in [Taft-Hartley] § 8(b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . [M]uch that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited.
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> . . . .
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> From these considerations of what is not prohibited by the statute, the true scope and limits of the legislative purpose emerge. The primary employer, with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences of a secondary boycott. Nor have other employers or persons who deal with either the primary employer or the secondary employer and who may be injuriously affected by the restrictions on commerce that flow from secondary boycotts. Nor has the general public.[24]

Here, we conclude that Congress clearly did not intend to prohibit the conduct at issue in this case. Indeed, it expressly permitted that conduct, despite the other prohibitions in the Act's relevant provisions.

3. The plain meaning of Section 8(b)(4)(B)

In interpreting the Act, it is well settled that basic principles of statutory construction apply: "[I]f a statute's meaning is plain, the Board and reviewing courts 'must give effect to the unambiguously expressed intent of Congress.'"[25] Section 8(b)(4)(B) prohibits secondary activity having the following objects:

> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recog-

[19] Id.
[20] 394 U.S. 369 (1969),
[21] Id. (internal quotations and citations omitted).
[22] 341 U.S. 675, 692 (1951).
[23] *NLRB v. Operating Engineers Local 825,* 400 U.S. 297, 303 (1971).
[24] *Carpenters Local 1976 v. NLRB,* 357 U.S. 93, 98–100 (1958). The precise holding in this case, allowing unions to employ "hot cargo" agreements to pressure neutral employers not to handle nonunion goods, was legislatively overruled in the Landrum-Griffin Act. However, the Supreme Court has subsequently cited this case with approval for its discussion of the general principles, set forth above, concerning the scope of Sec. 8(b)(4). See *Railroad Trainmen v. Jacksonville Terminal Co.,* supra, 394 U.S. at 387–388.
[25] *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 398 (1996) (quoting *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984). Accord: *Connecticut National Bank v. Germain,* 503 U.S. 249, 253–554 (1992). ("In interpreting a statute a court should always turn first to one, cardinal canon before all others. We have said time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last; judicial inquiry is complete.") (Citations and internal quotations omitted.)

> nize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [of the Act].

By its express terms, Section 8(b)(4)(B) addresses two distinct forms of secondary activity: (1) forcing or requiring an employer or any other person to "cease doing business with any other person" (a "cease doing business" boycott); and (2) forcing or requiring any other employer "to recognize or bargain with a labor organization as the representative of his employees" (a "recognition" boycott). With respect to recognition boycotts, Section 8(b)(4)(B) contains an exemption privileging such boycotts by a "labor organization [which] has been certified as the representative of such employees under the provisions of section 9 [of the Act]." Accordingly, we find that the plain meaning of the text of Section 8(b)(4)(B) is that it was not intended to condemn secondary activity, by a certified union, for the purpose of inducing the primary employer to recognize or bargain with that union.

The General Counsel contends that the statutory language authorizing secondary recognitional boycotts by certified unions acts as an exemption only to the prohibition, in the second clause of Section 8(b)(4)(B), against recognition boycotts by uncertified unions. According to the General Counsel, the first clause of Section 8(b)(4)(B), which governs "cease doing business" boycotts, applies regardless of whether a union is certified, and regardless of whether an object of its secondary activity is recognitional in nature. We reject this contention.

The construction of Section 8(b)(4)(B) advanced by the General Counsel would render the second clause of Section 8(b)(4)(B) entirely superfluous, as well as making the exemption from the second clause meaningless. It is difficult to conceive of a recognitional boycott that would not also have, as one of its objectives, forcing the secondary employer to "cease doing business" with the primary employer. Indeed, that is the basic means by which secondary boycotts exert pressure on the primary employer.[26] It is a fundamental canon of statutory construction that "'a legislature is presumed to have used no superfluous words.'"[27] As the trial examiners' opinions in *DiGiorgio* and its progeny recognize, we can give meaning to every word in Section 8(b)(4)(B) only if the specific prohibition against recognition boycotts, with its exception for certified unions, is construed to control in cases where a recognitional objective is established, rather than the broader, general prohibition against "cease doing business" boycotts.[28] Our holding today is entirely consistent with the analysis of Section 8(b)(4) in these prior decisions.

In light of the clear statutory language, our colleague appears to concede that, under Section 8(b)(4), a certified union may lawfully engage in at least some forms of secondary activity for the purpose of certification enforcement. However, our colleague would limit the scope of such activities to those that cannot be found to have a cease doing business objective. He posits a hypothetical situation in which a union's picketing of a neutral employer could be found to have recognitional, but not cease doing business, objectives because the union would seek only to force the neutral to persuade the primary employer to honor the certification, but not to cease doing business with it. The dissent asserts that this interpretation of Section 8(b)(4)(B) gives effect to the evident Congressional intent to allow secondary recognitional picketing by certified unions. Our colleague thus takes issue with our conclusion that the General Counsel's position would render superfluous that portion of Section 8(b)(4)(B).

We respectfully disagree with our colleague's position. It is by no means clear that the Board would find that the picketing described by our colleague was devoid of cease doing business objectives—an issue which we need not reach in deciding this case. In any event, there is no indication, either in the text of Section 8(b)(4)(B) or, as discussed below, in its legislative history, that Congress intended to allow secondary recognitional picketing only in the narrow circumstances identified by our colleague.

We also reject our colleague's assertion that the Supreme Court's decision in *Burns & Roe*[29] precludes a finding that the Respondent's picketing was lawful. In *Burns & Roe,* the Supreme Court held, among other things, that a union's picketing, which violated Section 8(b)(4)(B), because it had secondary objectives, *and,* potentially, Section 8(b)(4)(D), because it sought to force the reassignment of work, could be found to be a viola-

[26] See, e.g., *Denver Building Trades Council v. NLRB,* supra, 341 U.S. at 687 (Sec. 8(b)(4)'s prohibition against cease doing business boycotts "restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else"); *Electrical Workers v. NLRB,* supra, 181 F.2d at 37 (the essence of a prohibited cease doing business boycott "is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands").

[27] *Bailey v. U. S.,* 516 U.S. 137, 145 (1995) (quoting *Platt v. Union Pacific Railway Co.,* 99 U.S. 48, 58 (1978)).

[28] See also *Morales v. Trans World Airlines,* 504 U.S. 374, 384–385 (1992) ("it is a commonplace of statutory construction that the specific governs the general.").

[29] Supra.

tion of both, or either, section of the Act. Accordingly, the Board was not required to litigate the case only under Section 8(b)(4)(D). Here, we deal with the analytically distinct question of whether picketing and leafleting that are *lawful* under one part of Section 8(b)(4)(B) (dealing with recognitional boycotts) may nevertheless be found *unlawful* under another part of Section 8(b)(4)(B) (dealing with cease doing business boycotts). *Burns & Roe* does not address this issue.

We recognize that the Board and the courts have consistently held that a violation of Section 8(b)(4) is made out whenever *an* object of a union's picketing activity is among those proscribed by Section 8(b)(4).[30] The General Counsel contends that, because one of the Respondent's objectives was to force the United Way to cease doing business with VNHS, and to force United Way contributors to cease doing business with the United Way, a violation is made out even if the picketing also had an (otherwise lawful) recognitional objective. We disagree. The recognitional objective present in this case is, in the case of certified unions, specifically authorized by the Act. Accordingly, cases which hold that the existence of additional lawful objects—objects not specifically permitted by Section 8(b)(4)(B) itself—do not shield otherwise unlawful picketing from the reach of Section 8(b)(4), are distinguishable. They do not preclude our finding that the Respondent's picketing and leafleting in this case were lawful. Moreover, as noted above, a contrary conclusion would render meaningless the exemption for recognition boycotts by certified unions.

We similarly reject the General Counsel's contention that the Respondent's picketing had "tertiary" objectives that cannot be viewed as protected under any reading of Section 8(b)(4)(B). It is clear—indeed it is undisputed—that the Respondent sought to induce neutral contributors to the United Way to stop contributing to the United Way. However, this objective was integral to the Respondent's overall objective of inducing the United Way to stop its financial support of VNHS. The Respondent's picketing and leafleting was confined to the premises of the United Way, and there is no evidence or contention that, apart from those activities, the Respondent took any action directed at any United Way contributor.[31] In short, as the Supreme Court has observed in a similar context:

> The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises."[32]

Insofar as the Respondent's picketing in this case constituted an appeal to other neutral entities, including any contributors to the United Way, it did not exceed these bounds.

Finally, our reading of the Act has the virtue of averting the need to decide the First Amendment issues raised by the Respondent. See *Soft Drink Workers Local 812 v. NLRB,* 657 F.2d 1252, 1269 (D.C. Cir. 1980) ("[A] narrow construction of the statutory ban on secondary boycotts, relying only on the very clearest manifestations of congressional intent to ban a particular type of boycott, avoids collision with the Constitution"), citing *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964).

4. The Legislative History of Section 8(b)(4)(B)

Our interpretation of the plain language of Section 8(b)(4)(B), as providing an exemption for recognition boycotts by certified unions, is confirmed by the legislative history of the Act, which the General Counsel does not address. As noted above, the Conference Committee report for the Taft-Hartley amendments states that they were

> intended to reach strikes and boycotts conducted with a purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed. Moreover, strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative.[33]

Congress thus clearly understood that Section 8(b)(4) only bans recognition boycotts by "a labor organization that has not been certified as the exclusive representative." Congress did not proscribe either primary strikes for recognition

[30] See, e.g., *Denver Building Trades Council v. NLRB,* supra, 341 U.S. at 952.

[31] Cf. *NLRB v. International Rice Milling,* 341 U.S. 665, 671 (1951) (picketing lawful where "there was no attempt by the union to induce any action by the employees of the neutral customer [beyond appealing to them to refrain from crossing a primary picket line to pick up an order]. There were no inducements or encouragements applied elsewhere than on the picket line" at the primary situs).

[32] *Electrical Workers Local 761 v. NLRB,* supra, 366 U.S. at 673 (citations and internal quotations omitted).

[33] S. Rept. No. 105 on S. 1126 at 22, I Leg. History of the LMRA 428 (1948). As discussed above, the statements of Senator Taft, the chief Senate sponsor of this legislation, are consistent with the statements in the cited reports.

or, in the case of certified unions, secondary strikes and boycotts for recognition. Rather, as the passage quoted above makes clear, Congress understood that secondary recognitional activities, by a certified union, "are not made illegal."

This distinction between certified and uncertified unions was deliberate. As a general matter, Congress viewed secondary boycotts for recognition as unjustified because the Act provides unions with peaceful means to compel an employer to recognize and bargain with them —a Board-conducted election.[34] When, however, an employer refuses to abide by the results of an election, Congress was of the view that secondary boycotts to compel recognition should not be made an unfair labor practice. Our decision today gives effect to the distinction that Congress intended to draw between certified and uncertified unions.

Further, there is no evidence that Congress disapproved of this interpretation of Section 8(b)(4) when it enacted the Landrum-Griffin amendments. Congress was plainly aware of the Board's *DiGiorgio* decision at the time; the Landrum-Griffin Act overturned the holding in *DiGiorgio* that Section 8(b)(4) did not apply to agricultural laborers, together with the holdings in other cases with which Congress did not agree.[35] The *DiGiorgio* case also included the analysis of Section 8(b)(4)(B) quoted above, finding that secondary recognitional activity by a certified union is not unlawful. Although Congress amended Section 8(b)(4) in several significant respects, it chose not "to alter the provisions at issue" in this case.[36] This Congressional inaction further supports our decision to adhere to the construction of Section 8(b)(4) set forth in *DiGiorgio* and its progeny.[37]

Our dissenting colleague takes issue with the fairness of our decision. He asserts that employers who seek judicial review of a certification will be subject to the economic harm that may be inflicted by a secondary boycott and will have no recourse for redress even if the certification of representative is ultimately found to be defective by a reviewing court. We disagree.

The question of what effect, if any, a court decision refusing to enforce a Board order requiring an employer to bargain pursuant to a certification of representative would have on the legality of secondary recognitional picketing is not before us and we express no opinion on that issue. However, we reject our colleague's contention that we have upset a balance struck by Congress. As our colleague notes, an employer who wishes to obtain judicial review of a Board certification of representative must refuse to recognize the union and then litigate the representation issues in the context of an 8(a)(5) proceeding. We agree that an employer has a right to obtain judicial review in this manner. However, employees also have rights: most importantly, the right to bargain collectively through representatives of their own choosing. In cases where the certification of representative is proper, an employer's refusal to bargain, even when its purpose is to obtain judicial review, denies employees the opportunity to exercise this right. In recognition of this fundamental principle, the Board has long held that an employer's obligation to bargain attaches at the time the union wins the election, and that the employer acts at its peril when it makes unilateral changes while postelection proceedings are pending.[38] Just as an employer may seek judicial review of its duty to bargain, employees also may lawfully take steps to enforce their right to bargain. They may strike in support of the certification of representative, and, independently of our decision today, they may picket the primary employer for certification enforcement purposes.[39] To the extent that secondary recognitional picketing afford unions an additional means of applying pressure, that is a weapon Congress has deliberately elected to allow unions to use.

5. Application to facts of this case

Applying these principles here, we find that the Respondent's picketing and leafleting at the premises of the United Way did not violate Section 8(b)(4)(ii)(B). To make out a violation of Section 8(b)(4)(ii)(B), the General Counsel had to establish that: (1) the Respondent threatened, coerced, or restrained any person engaged in commerce or in an industry affecting commerce; (2) an object of the threats, coercion or restraint was to force or require any other employer to recognize or bargain with a labor organization as the representative of his employees; and (3) the Respondent was not certified as the Section 9 representative of the "other employer's" employees.

[34] In commenting on the justification for legislation addressing secondary boycotts, Senator Morse observed as follows:

> Another objective which it seems to me is not defensible is that involved in a secondary boycott designed to force an employer to recognize a union. By this device, labor unions attempt to organize employer A by bringing economic pressure to bear upon employer B. It seems to me that with the democratic election machinery of the Wagner Act available, and with the provisions according Federal protection to employees in their efforts to organize, it is no longer legitimate for labor to engage in this type of conduct.

93 Cong. Rec. 1910 (1947), II Leg. History of the LMRA 982 (1948).

[35] *NLRB v. Servette,* supra, 377 U.S. at 51 fn. 6.

[36] *NLRB v. Longshoremen,* 473 U.S. 61, 84 (1985).

[37] Id.

[38] See, e.g., *Hankins Lumber Co.,* 316 NLRB 837, 861 (1995).

[39] Sec. 8(b)(7), which treats recognitional picketing, specifically authorizes such picketing by a labor organization, which is "currently certified as the representative of such employees."

By threatening to engage in picketing at the premises of the United Way, and by picketing at those premises from March 4 to 11, the Respondent threatened, coerced or restrained the United Way. The stipulated facts clearly establish, and we find, that an object of the Respondent's picketing and leafleting was to force or require "any other employer," i.e., VNHS, to recognize and bargain with the Respondent as the representative of its staff nurses.[40] But at the time of the picketing and leafleting alleged to have violated Section 8(b)(4)(ii)(B), the Respondent had been certified by the Board as the exclusive collective-bargaining representative of the Respondent's staff nurses. Accordingly, the Respondent's picketing and leafleting of the United Way, for the objective described above, did not violate Section 8(b)(4)(ii)(B). That one of the Respondent's objectives was to force the United Way to cease doing business with VNHS and to force United Way contributors to cease doing business with the United Way is immaterial, for the reasons we have explained. We therefore find it unnecessary to pass on the Respondent's contention that a finding that its picketing and leafleting were unlawful would abridge its First Amendment rights.

D. Conclusion

It is our obligation, as the agency charged with enforcement of the National Labor Relations Act, to give meaning and effect to all of its provisions. In holding today that unions may lawfully engage in secondary activity where an object of that activity is to induce the primary employer to recognize and bargain with that union as the certified exclusive collective-bargaining representative of its employees, we have done no more than carry out this obligation. We reject any contention that our holding will "open the floodgates" to widespread use of secondary pressures by unions. Our holding is limited in several significant respects. First, the exemption from Section 8(b)(4)(B)'s general prohibition against cease doing business and recognition boycotts is available only to unions that have been certified by the Board under Section 9 of the Act as the representative of the primary employer's employees. The exemption is not available to any labor organization that does not meet this threshold requirement. Second, this exemption only applies in cases where an object of the secondary activity is to force or require the primary employer to recognize or bargain with its employees' certified collective-bargaining representative. In cases where certification enforcement is not an object of a respondent union's secondary activity, the exemption is, by its terms, not applicable. It is evident that, in cases where the exemption does apply, neutral employers may be subject to secondary boycott pressures. However, Congress has chosen not to protect neutral employers from secondary activity in these circumstances. In our decision today, we have given effect to the choice the Congress has made.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. The Charging Party, VNHS, is a person and an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

3. United Way, the Coca-Cola Company, Inc. and BellSouth Telecommunications, Inc., are persons and employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act.

4. The Respondent has not violated Section 8(b)(4)(ii)(B) of the Act.

ORDER

The complaint is dismissed.

CHAIRMAN HURTGEN, dissenting.

The issue in this case is whether a neutral employer can be subjected to a union's picketing simply because that neutral does business with an employer who has exercised its right to seek judicial review of a Board decision in a representation case. My colleagues answer in the affirmative. I disagree.

[40] The Respondent's February 12 letter to the United Way set forth the pertinent facts concerning its certification by the Board as the representative of VNHS's staff nurses. That letter also stated that the Respondent intended to picket the United Way because it provided financial support to VNHS, and that the picketing would cease when the United Way provided assurances that it would stop supporting VNHS until VNHS "complies with its obligations to recognize and bargain with" the Respondent, or when VNHS "complies with its obligations under" the Act, whichever occurred sooner. Consistent with the Respondent's letter, its picket signs and leaflets indicated that the United Way was "unfair" because it supported a "convicted labor law violator," VNHS. It is evident from these facts that an object of the Respondent's picketing and leafleting was to force or require VNHS to bargain with it.

The General Counsel asserts that the Respondent's picket signs were defective because they did not specifically mention VNHS and might therefore have misled the public into believing that the United Way had been unfair in its dealings with the Respondent. We do not agree with this contention. Fairly read, the Respondent's picket signs indicate that the Respondent's dispute with the United Way relates to its monetary contributions to a "labor law violator," and do not suggest that the United Way was in some way "unfair" with respect to its own employees. Moreover, at all times when picketing took place the Respondent distributed leaflets that spelled out in greater detail the nature of the Respondent's dispute and specifically identified VNHS. The leaflets further urged the public to stop contributing to the United Way until the United Way stopped supporting VNHS.

I would find that the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act by threatening to picket and picketing, the United Way of Metropolitan Atlanta, a neutral, because *an* object of those actions was to force or require the United Way to cease doing business with the Employer, Visiting Nurses Health System (VNHS). There is no warrant in the text of Section 8(b)(4), its legislative history, or the basic policies of the Act for the contrary result that the majority reaches today.

Facts

On July 18, 1994, the Respondent Union was certified by the Board as the exclusive collective-bargaining representative of the VNHS staff nurses.[1] Thereafter, VNHS exercised its right to obtain judicial review of the Board's certification by refusing to recognize the Respondent. On December 8, 1995, the Board issued a Decision and Order finding that VNHS's refusal to recognize and bargain with the Respondent violated Section 8(a)(5) and (1).[2]

Unwilling to await the conclusion of the legal process, however, Respondent took matters into its own hands. On February 12, 1997,[3] the Respondent wrote to one of VNHS's sources of funding, the United Way, and threatened to picket the United Way unless it provided assurances that it would stop funding VNHS until such time as VNHS recognized and bargained with the Respondent. The United Way did not provide the Respondent with the assurances it had demanded. Consistent with its threats, from March 4 to 11, the Respondent engaged in picketing on the public sidewalk at the public entrance to the United Way's Atlanta, Georgia offices. The picket signs stated:

TO THE PUBLIC.
UNITED WAY IS
UNFAIR
MONEY SUPPORTS
A CONVICTED
LABOR LAW
VIOLATOR

The handbills distributed by the Respondent's agents read as follows:

To the Public:
United Way is Unfair.

It's [sic] money supports Visiting Nurses
Health System
(A Convicted Labor Law Violator)
Please Stop Your Contributions
until United Way discontinues it's [sic]
support of VNHC.

[Emphasis in original.]

The Respondent admits that it did not have a labor dispute with the United Way at any time material to this case. On March 31, barely a month after the Respondent's picketing, the United States Court of Appeals for the Eleventh Circuit enforced the Board's Decision and Order finding that VNHS had violated Section 8(a)(5) and (1) by refusing to bargain with the Respondent.[4]

Analysis

In 1947, the National Labor Relations Act was amended by the Taft-Hartley Act.[5] The Taft-Hartley amendments were primarily aimed at curbing certain union abuses. Chief among those abuses was the secondary boycott, "which was conceived of as pressure brought to bear, not 'upon the employer who alone is a party (to a dispute), but upon some third party who has no concern in it,' with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands."[6] Accordingly, the Taft-Hartley amendments added to the Act a new Section 8(b)(4) which, in pertinent part, stated that it was an unfair labor practice for a labor organization to:

> engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; [or]
>
> (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative

[1] V*isiting Nurses Assn. of Metropolitan Atlanta,* 314 NLRB 404 (1994). On May 10, 1995, the Board issued an unpublished Decision in Case 10–AC–49 amending Local 1063's certification to reflect the name of its successor organization, the Respondent.

[2] *Visiting Nurses Assn. of Metropolitan Atlanta,* 319 NLRB 899 (1995), enfd. sub nom. *Visiting Nurse Health System v. NLRB,* 108 F.3d 1358 (11th Cir. 1997), rehearing and suggestion for rehearing en banc denied 118 F.3d 1581 (11th Cir. 1997).

[3] Unless otherwise noted, all dates are in 1997.

[4] *Visiting Nurse Health System v. NLRB,* supra.

[5] P.L. 80–101, 61 Stat. 136 (1947).

[6] *NLRB v. Burns & Roe, Inc.,* 400 U.S. 297, 302–303 (1971) (quoting *Electrical Workers v. NLRB,* 181 F.2d 34, 37 (2d. Cir. 1950), affd. 341 U.S. 694 (1951)).

> of such employees under the provisions of section 9 [of the Act].[7]

In 1959, the Landrum-Griffin Act,[8] among other things, amended Section 8(b)(4) to its current form which, in pertinent part, makes it an unfair labor practice for a labor organization:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [of the Act]: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

The Landrum-Griffin amendments were designed to close certain loopholes in the application of Taft-Hartley Section 8(b)(4)(A) which had been exposed in Board and court decisions.[9] Although, Section 8(b)(4)(A) and (B) of the Taft-Hartley Act were combined into a single provision, i.e., present-day Section 8(b)(4)(B), there is no indication that Congress intended to narrow the scope of the restrictions on secondary boycotts.

Under Section 8(b)(4)(B), "[a] union is permitted to picket a primary employer with whom it has a labor dispute, but it runs afoul of Section 8(b)(4) if it pickets a neutral employer with the proscribed object of enmeshing the neutral employer in a controversy not its own."[10] Thus, Section 8(b)(4)(B) "restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."[11] The essence of a prohibited secondary boycott "is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands."[12]

Section 8(b)(4)(B) additionally proscribes picketing of a neutral employer where an object of the picketing is to force the primary employer to recognize the union. By its terms, Section 8(b)(4)(B) contains a proviso authorizing secondary picketing for *this object* in cases where the union "has been certified as the representative of such employees under the provisions of section 9" of the Act. Accordingly, if an employer is refusing to honor a Board certification of representative, the union may picket a neutral employer for the sole purpose of forcing the primary to recognize or bargain with it.

However, this proviso only limits the application of the statutory prohibition against picketing of a neutral to obtain recognition as the certified representative. Under the plain language of Section 8(b)(4)(B), it does not qualify the prohibition against picketing of a neutral to force the neutral to cease doing business with the primary.[13] And, under Section 8(b)(4)(B), if *an* object of the picketing is proscribed, the picketing is unlawful even if the picketing has other, lawful objectives.[14] In the instant case, the Respondent had two objectives: (1) to force the United Way to cease doing business with VNHS; and (2) to force VNHS to recognize the Respondent. The second object was saved by the proviso; the first object was not saved, for there is no proviso with respect to it.

The majority argues that as long as an object of a union's secondary activities is recognitional, and the union is certified, there is no violation even if the union also has a cease doing business objective. There is no merit to this contention. As noted above, it is clear from the text and legislative history of the Act that Section 8(b)(4) applies as long as *an* objective of the union's actions is proscribed. The Supreme Court has never recognized an exception to this established principle. Until today, the Board has not recognized such an exception either. Moreover, Section 8(b)(4)(B), as set forth above, is derived from Taft-Hartley Section 8(b)(4)(A) and (B). Thus, as originally enacted by Congress, these provisions were distinct subsections of Section 8(b)(4). In 1959, Congress combined the two. The proviso remained as it was, i.e., attached only to the recognitional objective. There is thus no basis for finding that the proviso to former subsection (B) has any effect on the scope of former

[7] P.L. 80–101, 61 Stat. 136 (1947), Sec. 101.

[8] P.L. 86–257, 73 Stat. 542–543 (1959).

[9] *NLRB v. Servette,* 377 U.S. 46, 51 (1964).

[10] *Oil Workers Local I-591 (Burlington Northern Railroad),* 325 NLRB 324, 326 (1998).

[11] *Denver Building Trades Council v. NLRB,* 341 U.S. 675, 687 (1951).

[12] *Electrical Workers v. NLRB,* supra.

[13] Contrary to my colleagues, the "cease doing business" objective is specifically forbidden under Sec. 8(b)(4)(B).

[14] See, e.g., *Denver Building Trades Council v. NLRB,* supra, 341 U.S. at 952.

subsection (A).[15] The Conference Committee Report for the Taft-Hartley Act does not support the position of my colleagues. The report says that "strikes and picketing for recognition are not made illegal." However, as discussed above, strikes and picketing for a "cease doing business" objective are illegal.

My colleagues argue that legality under a portion of Section 8(b)(4) means legality under another portion. However, the Supreme Court has held that each portion of Section 8(b)(4) is to be treated on its own bottom. In *Burns & Roe,*[16] the Supreme Court summarily rejected the respondent union's contention that, because its secondary activity had an objective of changing the assignment of disputed work, Section 8(b)(4)(D) provided the exclusive remedy, and its actions therefore could not be addressed under Section 8(b)(4)(B). The Court stated that, "[a]lthough § 8(b)(4)(D) also applies to neutrals, the basic purpose is different from that of § 8(b)(4)(B). The practices here were unfair under both sections and there is no indication that Congress intended either section to have exclusive application."[17] These same considerations preclude the interpretation of Section 8(b)(4)(B) adopted by the majority today.[18]

The majority's position is also inconsistent with the procedure established by Sections 9 and 10 of the Act for review of Board decisions in representation cases. Section 9 provides that, whenever the Board determines that a question concerning representation exists, "it shall direct an election by secret ballot and shall certify the results thereof." There is no provision in the Act for direct judicial review of Board certifications in representation cases.[19] Rather, except in extraordinary circumstances,[20] representation proceedings may be reviewed by the courts only after the Board has based an order in an unfair labor practice proceeding on facts found in the representation proceeding. Congress chose to exclude representation proceedings from direct judicial review in order to "prevent dilatory tactics and delay in certification."[21] Due process concerns are satisfied by the provisions in the Act for judicial review of the unfair labor practice order.

By authorizing unions to engage in secondary boycotts and picketing, solely on the basis of a certification of representative, the majority has upset the "deliberate choice of conflicting policies" made by Congress when it excluded representation proceedings from direct judicial review.[22] The Act clearly affords any aggrieved party the right, through a "test-of certification" or "technical" 8(a)(5) proceeding, to obtain judicial review of a certification of representative issued by the Board.[23] Yet even while those proceedings are pending, as was the case here, the majority finds that the employer may be lawfully subjected to secondary boycotts. The unfairness of the majority's position is patently obvious. Employers will be pressured into foregoing their right to judicial review of a certification of representative. Employers who persist in seeking judicial review will be subject to the economic harm inflicted by a secondary boycott and will, so far as the majority is concerned, have no recourse for redress even if the certification of representative is ultimately found to be defective by a reviewing court. I cannot agree that Congress intended so perverse a result when it enacted Section 8(b)(4). Surely, an employer—and neutrals with whom the employer does business—ought not be penalized simply because the employer is seeking judicial review.

The majority says that an employer's refusal to bargain and a union's resort to secondary picketing are analogous and that there is nothing unfair about allowing the latter when the employer engages in the former. I do not agree with this comparison. A refusal to bargain is the only means by which an employer may vindicate its right to judicial review. Unions, by contrast, have other means by which to protest a refusal to bargain. As the majority notes, these include striking or engaging in primary pick-

[15] As noted above, there is no indication that the Landrum-Griffin Act narrowed the reach of Taft-Hartley Sec. 8(b)(4)(A) by combining it with Taft-Hartley Sec. 8(b)(4)(B).

[16] Supra, 400 U.S. 297.

[17] Id. at 305–306.

[18] Contrary to the majority, *Burns & Roe* is not distinguishable on the grounds that the union conduct there violated both Secs. 8(b)(4)(B) and 8(b)(4)(D), while the picketing here has an object (cease doing business) that is proscribed and an object (recognition) that is not proscribed, under the second part of Sec. 8(b)(4)(B), because the Respondent was certified. *Burns & Roe* stands for the proposition that the different parts of Sec. 8(b)(4) do not have "exclusive application." The majority's decision plainly contravenes that principle.

[19] *AFL v. NLRB,* 308 U.S. 401, 409 (1940).

[20] See *Leedom v. Kynes,* 358 U.S. 184 (1958).

[21] *Lawrence Typographical Union v. McCulloch,* 349 F.2d 704, 707 (D.C. Cir. 1965).

[22] *AFL v. NLRB,* 308 U.S. 401, 411 (1940).

[23] The procedure is as follows:

> to obtain judicial review of a § 9 "representation" decision, an objecting firm, or a "losing" union, must take a roundabout, "back door" route. It must transform the "representation proceeding into an "unfair labor practice" determination. It can do so by 1) engaging in an activity (typically, refusing to bargain or picketing) that amounts to an unfair labor practice if, but only if, the Board's § 9 decision is proper; 2) making certain that the Board then finds that it has engaged in an unfair labor practice; and, then, 3) petitioning a court to set aside the "unfair labor practice" determination on the ground that the underlying "representation" determination is improper.

Union de la Construccion de Concreto y Equipo Pesado v. NLRB, 10 F.3d 14, 16 (1st Cir. 1993).

eting. Unlike the secondary picketing that my colleagues have found lawful in this case, these means do not expand the dispute to include innocent neutrals.

While employees necessarily may be temporarily denied the fruits of a certification of representative by an employer's refusal to bargain, in cases where a certification is ultimately found valid, that delay is a consequence of Congress' choice not to make Board orders self-enforcing. Any harm suffered by employees as a result of unilateral changes in terms and conditions of employment during this interim period may, of course, be remedied by a "make whole" order where appropriate. On the other hand, a reviewing court may determine that the certification is defective, and that the employer's refusal to bargain was therefore lawful. The majority is unwilling to say whether the victims of secondary picketing are entitled to any relief in these circumstances. In short, an employer's "cert-testing" refusal to bargain is consistent with the statutory scheme Congress has established; the majority's position is not.

The majority asserts that the legislative history supports their view that secondary picketing for certification enforcement is lawful even if it also has cease doing business objectives. I do not agree. As shown above, the legislative history indicates that Congress intended to broadly proscribe secondary activity by unions. Section 8(b)(4) thus embodies "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[24]

Nor can it be said that the secondary boycott here is "good" (and therefore lawful) because it had, as an objective, the enforcement of a Board certification. Senator Taft, who was the sponsor of the bill and was the Chairman of the Senate Committee on Labor and Public Welfare said, in discussing this section of the legislation,

> under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing dealing with secondary boycotts as to make them an unfair labor practice."[25]

It is plain that the Respondent, by its picketing at the premises of the United Way, sought to embroil the United Way, a neutral, in the Respondent's dispute with VNHS. There is no contention in this case that the Respondent's picketing was in any way primary in nature. The Respondent concedes that it was not.[26] The ambiguous statements from the legislative history cited by my colleagues fail to show that Congress intended to authorize what the Act so clearly proscribes.

Likewise, the cases cited by my colleagues fail to justify their position. Indeed, the majority concedes that this is a case of first impression. In the Board decisions cited by the majority, administrative law judges (then called trial examiners) expressed the opinion that the proviso to Taft-Hartley Section 8(b)(4)(B) acted as a limitation on the reach of both that subsection and Section 8(b)(4)(A). See *Teamsters Local 87 (DiGiorgio Wine Co.)*;[27] *Sailors Union (Moore Dry Dock);*[28] *Teamsters Local 554 (McAllister Transfer, Inc.).*[29] However, these statements are dicta at best.[30] Moreover, in *Teamsters Local 364*

[24] *NLRB v. Denver Building Trades,* supra, 341 U.S. at 692.

[25] 93 Cong. Rec. 4198.

[26] See R. Br. at 4 ("[t]he stipulated facts in this case establish that the Union has engaged in secondary recognitional picketing").

In light of the undisputedly secondary nature of the Respondent's picketing, the cases cited by the majority concerning the difficulty, in other contexts, of distinguishing primary from secondary activity are beside the point. See, e.g., *Carpenters Local 1976 v. NLRB,* 357 U.S. 93, 98–100 (1958); *Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 387–388 (1969).

[27] 87 NLRB 720, 722, 748–749 (1949), affd. other grounds 191 F.2d 642 (D.C. Cir. 1951), cert. denied 342 U.S. 869 (1951).

[28] Supra.

[29] 110 NLRB 1769, 1782–1805 (1954) (dicta).

[30] In *DiGeorgio,* the trial examiner's views concerning the scope of the proviso were dicta, because he found that the unions in question were not entitled to the proviso's protections in any event because they were not certified and the Board adopted this separate holding. See 87 NLRB 720, 722. In *Moore Dry Dock,* the Board did not pass on the trial examiner's discussion of certification enforcement boycotts in the absence of exceptions and in light of its holding, on other grounds, that the disputed picketing was lawful primary picketing. See 92 NLRB at 552 fn. 17. Likewise, in *McAllister Transfer,* the Board did not pass on the trial examiner's discussion of certification boycotts. See 110 NLRB at 1782.

Congress may have been aware of *DiGiorgio* when it enacted the present Sec. 8(b)(4)(B) as part of the 1959 Landrum-Griffin amendments. However, *DiGiorgio* did not rule on the issues before us. It is noteworthy that Congress did legislatively overrule cases in which secondary activity had actually been held lawful under the Taft-Hartley Act. See fn. 34, infra. My colleagues' decision today is inconsistent with the direction of those congressional efforts to close off the "loopholes" allowing secondary activity to continue. See generally *NLRB v. Servette,* supra.

(Light Co.),[31] the Board rejected as "gratuitous" the trial examiner's statements to the effect that secondary boycotts for recognition by a certified union are lawful notwithstanding their cease doing business objective. Accordingly, neither the views expressed by the trial examiners in these decisions, nor the views of various commentators also cited by the majority, represent authoritative constructions of the Act. In these circumstances, they are entitled to no controlling weight.

My colleagues also quote extensively from *Carpenters Local 1976 v. NLRB*.[32] The case offers them no support. The Supreme Court held there that a neutral employer could *voluntarily agree* with a union to cease doing business with a primary employer. Such conduct was a secondary boycott, but it was not proscribed by the Taft-Hartley Act.[33] However, the instant case involves picketing of a neutral, conduct outlawed by Section 8(b)(4).

My colleagues argue that my construction of Section 8(b)(4)(B) would render the proviso superfluous. They argue that conduct aimed at a neutral to force the primary to honor a certification would necessarily be aimed at forcing a cessation of business between the neutral and the primary. I disagree. A union could picket a neutral to force the neutral to exercise whatever influence it could bring to bear, short of a cessation of business, to persuade the primary to honor a certification. For example, it would not be unusual for an official of a picketed neutral employer to strenuously urge an official of the primary to honor the certification, but not go so far as to threaten a cessation of business.[34]

Applying the foregoing principles to the facts of this case, it is clear that the Respondent's picketing at the premises of the United Way violated Section 8(b)(4)(ii)(B). The Respondent admits that it is engaged in a labor dispute with VNHS and that the United Way is a neutral with respect to that dispute. The Respondent's threats and picketing plainly constitute threats, coercion, or restraint of the United Way within the meaning of Section 8(b)(4)(ii).[35] In addition, the Respondent concedes that an object of the picketing was to induce the United Way to cease contributing funds to VNHS. It is evident from the foregoing that an object of the Respondent's actions was to force or require the United Way to cease doing business with VNHS, within the meaning of Section 8(b)(4)(ii)(B).[36] An 8(b)(4)(ii)(B) violation has therefore been made out.

[31] 121 NLRB 221 fn. 1, 233–234 (1958), enfd. 274 F.2d 19 (7th Cir. 1960).

[32] Supra.

[33] In reaction to this case, Congress closed the "loophole" by enacting Sec. 8(e) to proscribe such conduct.

[34] My colleagues say that there is no indication that Congress intended to allow secondary recognitional picketing only in the circumstances I have identified. I do not agree. As set forth above, there is every indication that Congress intended to outlaw all secondary picketing having a "cease doing business" object, even if that is only one of the objects of the picketing. The majority does not dispute that my reading of Sec. 8(b)(4)(B) gives meaning to all of its provisions. Under these circumstances, there is no justification for the broader interpretation my colleagues would place on the statutory language.

[35] See *Electrical Workers Local 501 v. NLRB,* 341 U.S. 694, 701–702 (1951) (peaceful picketing is encompassed by Sec. 8(b)(4) and is not protected by the First Amendment).

[36] In its answer, the Respondent admits that an object of its picketing was to induce United Way to cease funding VNHS. Consistent with the admissions in its answer, the Respondent does not dispute that the United Way is "doing business" with VNHS, within the meaning of Sec. 8(b)(4).